INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	4
Reasons for granting the writ	7
Conclusion	20

CITATIONS

Cases:

Asselta v. 149 Madison Ave. Corp., 156 F. (2d) 139 (C. C. A. 2) 13
Bumpus v. Continental Baking Co., 124 F. (2d) 549, 551, 552 (C. C. A. 6), certiorari denied 316 U. S. 704 14
Castle v. Walling, 153 F. (2d) 923 (C. C. A. 5) 13, 15
149 Madison Ave. Corp. v. Asselta, 331 U. S. 199 8, 13, 14, 15
Overnight Motor Co. v. Missel, 316 U. S. 572, 577, 578 7, 8, 14
Patsy Oil & Gas Co. v. Roberts, 132 F. (2d) 826 (C. C. A. 10) 13, 15
Seneca Coal & Coke Co. v. Lofton, 136 F. (2d) 359 (C. C. A. 10), certiorari denied 320 U. S. 772 13, 15
United States v. Rosenwasser, 323 U. S. 360 12, 14
Walling v. Alaska-Pacific Consolidated Mining Co., 152 F. (2d) 812 (C. C. A. 9), certiorari denied 327 U. S. 803 13, 15
Walling v. A. H. Belo Corp., 316 U. S. 624 8
Walling v. Green Head Bit & Supply Co., 138 F. (2d) 453 (C. C. A. 10) 13, 15
Walling v. Halliburton Oil Well Cementing Co., 331 U. S. 17, 24-25 8, 9
Walling v. Harnischfeger Corp., 325 U. S. 427, 431, 432 8, 9, 10, 12, 14, 15
Walling v. Helmerich & Payne, 323 U. S. 37, 40 8, 13, 14, 15
Walling v. Wall Wire Products Co., 161 F. (2d) 470 (C. C. A. 6) 14
Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 423, 424, 425 8, 9, 12, 14
Watkins v. Hudson Coal Co., 151 F. (2d) 311 (C. C. A. 3), certiorari denied 327 U. S. 777 13, 15

Federal Statutes:

Fair Labor Standards Act of 1938 (52 Stat. 1060), 29 U. S. C. 201-219:
Section 7 3
Section 16 (b) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.....

HARVEY DeWATERS,
Petitioner,

vs.

MACKLIN COMPANY,
a Michigan Corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harvey DeWaters, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above case on April 26, 1948.

OPINIONS BELOW

The findings of fact, and conclusions of law, of the District Court (R. 94-99) are reported in 69 Fed. 262, 6 W. H. Cases 776.

The opinion of the Circuit Court of Appeals (R. ...) is reported at 167 Fed. 2d. 694 and 7 W. H. Cases 925.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 26, 1948 (R. ...). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under respondent's "Production Savings Plan," its total monthly wage is a fixed percentage (from 19% to 24% during the period involved in this suit) of an assigned "production value" of each unit produced. The rate per unit thus paid is the same without regard to whether the work is performed during straight time or overtime hours. Guaranteed hourly rates are advanced to the employees with time and one half for overtime. The difference between such sum total of unit rates and the hourly rates previously advanced is then allocated to individual employees on the basis of the amount previously advanced to them on hourly rates. The question presented is whether such method of compensation may be deemed to include overtime payments in accordance with Section 7 of the Act.

STATUTE INVOLVED

The pertinent provisions of Fair Labor Standards Act of 1938 (52 Stat. 1060) 29 U. S. C. (Sec. 201-219) are as follows:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."
>
> "Sec. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

STATEMENT

The instant cause was instituted by petitioner and 390 other plaintiffs, who constituted practically all[1] of the production employees of the Macklin Company, defendant. They were employed in the manufacture of grinding wheels and other abrasive products in defendant's plant in Jackson, Michigan.

During the trial in the court below when the record was complete as to all the plaintiffs except that only the wage records of Harvey DeWaters had been placed in evidence, the respondent upon the court's suggestion moved for a separate trial as to Harvey DeWaters which motion was granted by the court over the objection of plaintiff's attorneys (R. 50). The judgment of the District Court and the subsequent proceedings herein apply only to DeWaters. The final decision herein will, however, control the determination as to the remaining plaintiffs.

The respondents' "Production Savings Plan" was instituted in the fall of 1938, about the time of the effective date of the Act (R. 53-54). The effect of this plan has been to fix the employer's wage costs at a predetermined amount for each unit of production regardless of the number of hours worked by employees. There is no dispute between the parties as to the operation of the plan. The plan operates in the following manner: Each item produced is given a "production value" which is appellee's list price of the item minus the "trade discount" (R. 96-98). The list prices and trade discounts have been unchanged since 1937, so that the "production value" of each item has been unchanged since that date (R. 97-98).

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[1] During the period involved, defendant employed approximately 400 production employees (51).

For example, a silicate carbon vitrified wheel, which is listed at $10.25, has been assigned a "production value" of $3.90 (R. 97-98). Other products have different list prices and "production values" (R. 98). At the end of each month, a fixed percentage of the total "production value" of the items produced during that month is set aside (R. 98-99). At the time of trial the employees are allotted 24 percent of the "production value" (R. 56).[2] Thus for each silicate carbon wheel produced, appellee pays in wages $0.936 (24 percent of $3.90) (R. 98-99). The manner of dividing the sum total of such unit or piece rates among the employees is illustrated in Exhibit 1 (R. 174-175).

This Exhibit 1 shows the operation of the Production Savings Plan in January 1945. Reduced to round numbers, the total "production value" in that month was $470,000. Thus $112,800 (24 percent of $470.00) was the total wage cost. Since appellee had already advanced $97,700 in weekly wage payments during that month, it made an additional payment of $15,100 under the Production Savings Plan. The additional payment ($15,100) was 15½ percent of wages already advanced ($97,700). Hence each employee received an additional sum equal to 15½ percent of the wages previously advanced to him (R. 174-175).

Employees under the plan receive a wage payment each week based on an hourly rate of pay, and time and one-half that rate for the time worked in excess of 40 hours (R. 101, 109). Since 1942, for the great majority of employees, these wage advances have been based on an

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[2] When the plan was inaugurated the employees were allotted 19 percent of "production value," and the percentage has been increased from time to time (R. 103).

hourly rate of 90 cents (R. 43, 101).[3] Each month the excess of the fixed percentage of "production value" over the amounts advanced at hourly rates is allocated to employees in proportion to the amounts previously advanced (R. 54). In every month since June 1939, the share of "production value" allotted to wage costs, or in other words the sum total of the unit rates, has exceeded the wages advanced at the assigned hourly rate (R. 119, 111). Thus, except for two months early in 1939, the wage advances have been of no significance in determining appellee's total wage payments since under appellee's plan the wages thus advanced had to be increased in an amount necessary to make the total monthly wage bill equal the predetermined percentage of "production value" (R. 119, 111).

The percentage by which the total amount due under the piece rates or fixed percentage of "production value" exceed the guaranteed hourly rates for each month from the inception of the plan until the institution of suit are set forth in the record on page 119 and average 15.57%.

Petitioner contends that he has not been paid any overtime compensation whatsoever, because the defendant's wage payment plan is actually a group piece rate plan under which the total wage payments per unit of production are the same regardless of whether or not overtime hours are worked, and that his regular rate can only be determined by dividing his total compensation per week by the number of hours worked per week.

Respondent's contention is stated in the opinion of the Circuit Court of Appeals (R. ...) as follows:

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[3] Beginners, custodial employees, and female employees receive a lower rate; night shift and a few maintenance workers receive 95 cents (R. 53).

> "Appellee contends that the 'regular rate' at which the employee was employed was the regular contract rate of 90 cents per hour plus that portion of the production savings, which was allocated under the plan to straight time compensation * * *"

Both the District Court and the Circuit Court of Appeals adopted respondents' view. A brief was filed and oral argument made before the Circuit Court of Appeals for the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae*, who supported petitioner's position herein.[4]

REASONS FOR GRANTING THE WRIT

Respondent's plan, like many of the plans which have been held invalid because inconsistent with the overtime provisions of the Act, appears superficially to provide for the requisite overtime compensation. In analyzing such plans where there is a semblance of compliance and the deficiencies are not readily apparent, it is helpful and, we think, particularly important to an understanding of the operation and effect of the plan, to review and have clearly in mind the basic aims of the overtime provisions of the Act. In one of the first cases involving the overtime provisions to reach this Court, *Overnight Motor Co. v. Missel*, 316 U. S. 572, this Court expressed its agreement with the statement of the circuit court of appeals that "one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment *by reducing hours of work*" [italics supplied] 316 U. S. at 577. To attain this end, said the Court, "although overtime

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[4] Since the brief *amicus* concisely sets forth the arguments in opposition to the validity of respondent's plan we have adopted such brief to a large extent herein.

was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage • • •. Reduction of hours was a part of the plan from the beginning." 316 U. S. at 578.

This Court has repeatedly stated that one of the basic purposes of the Act was to reduce hours of work *"by placing financial pressure on the employer." (Walling v. Helmerich & Payne,* 323 U. S. 37 at 40 [italics supplied]), that the intent was to accomplish the statutory purpose *"by increasing the employer's labor costs by 50%* at the end of the 40-hour week"*(Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419 at 423 [italics supplied]), that *"A full 50% increase in labor costs* and a full 50% wage premium • • • were meant to flow from the operation" of the overtime provisions *(Walling v. Harnischfeger Corp.,* 325 U. S. 427 at 431 [italics supplied]). The Court has held that plans which allow the employer "to escape completely the burden of a 50% premium for the [overtime] hours" *(Youngerman-Reynolds Hardwood Co.,* 325 U. S. at 426), or which make "A full 50% increase in labor costs [for overtime] • • • impossible of achievement" *(Harnischfeger Corp.,* 325 U. S. at 431) cannot be sanctioned.[5] Since under respondent's plan, as we shall show, its wage costs remain constant whether it works 10 employees for 60 hours or 15 employees for 40 hours, the legislative intent is "impossible of achievement" under respondent's wage plan.

We submit that in practical effect the "Production Savings Plan" is a system of piece rate compensation, sub-

[5] *Cf. Walling v. A. H. Belo Corp.,* 316 U. S. 624, and *Walling v. Halliburton Oil Well Cementing Co.,* 331 U. S. 17, which, although apparently constituting exceptions to the general rule laid down in the cases cited above, are inapplicable here where there is "no provision for a guaranteed weekly wage." *147 Madison Ave. Corp. v. Asselta,* 331 U. S. 199, 209.

stantially the same as those presented to this Court in *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling v. Harnischfeger Corp.*, 325 U. S. 427. In both of these cases, notwithstanding the contractual provision for hourly rates of pay, the piece rate was held to be the actual measure of compensation so that the failure of the plans to provide for overtime compensation on the piece rate earnings was held to constitute a violation of the overtime requirements of the Act. We submit further that compliance with the Act cannot be attained by retroactively allocating the piece rate payments, which are constant for both straight-time and overtime hours, into straight-time and overtime segments at the end of each month. See *Walling v. Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 24-25.

1. *The Production Savings Plan is the equivalent of a piece rate system of compensation.* Despite the somewhat complicated provisions of the plan, the so-called bonus features in actual fact do no more than establish a group piece rate for appellee's employees. To use the example which appears in the record, the employment agreement is the same as though it provided that the employees as a group shall receive $.936 for each silicate carbon wheel produced. The legal effect of employing a piece rate cannot be changed by describing the arithmetical method by which the piece rate is determined rather than directly setting the rate itself. Instead of simply providing that the employees as a group shall be paid $.936 for each silicate carbon wheel, the plan provides that they shall receive 24 percent of "production value," listed by appellee at $3.90, which equals $.936. The total pay roll at the end of each month is 24 percent of total "production value" or the component of various piece rates.

Similarly, the description of the plan in terms of a "bonus" to be paid in addition to stated hourly rates does not alter its piece rate character. *Walling v. Harnischfeger Corp.*, 325 U. S. 427. In the *Harnischfeger* case this Court described a comparable wage agreement as one under which employees "are each paid a basic hourly rate plus an 'incentive bonus' or 'piecework earnings.'" 325 U. S. at 428. In that case employees received an agreed hourly rate for the time necessary to perform a given job and the difference between these earnings and a so-called job price as an "incentive bonus." The Court regarded employees paid in this manner as "in fact paid entirely on a piecework basis with a minimum hourly guaranty." 325 U. S. at 431.[6] The *Harnischfeger* case involved piece rates applicable to a group basis, as here, and also piece rates which applied to the work of individual employees. The Court's opinion, which makes no reference to these different situations apparently considered the principle of the decision equally applicable to each.[7] Thus in all essential respects appellee's compensation plan is directly comparable to the plan reviewed by the Court in the *Harnischfeger* case. It follows, therefore, as the Court there held that "When employees do earn more than the basic hourly rates because of the operation of the incentive bonus plan the

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[6] The fact that in a few instances compensation at the agreed hourly rates exceeded the job price or piecework earnings was not considered significant in determining the actual basis of compensation when the piece rate controlled. 325 U. S. at 432. Cf. the two months in 1939 in the instant case (R. 119).

[7] Although the Supreme Court's opinion does not advert to the job prices fixed for groups of employees, this situation was specifically before the Court and it can hardly be doubted was within the purview of its decision. The employer's brief contains the statement that 98 percent of the "jobs" upon which prices were placed were assigned to groups of individuals, rather than to individuals. The operation of the plan with respect to group projects is illustrated in Defendant's Exhibit A, page 80, of the record in the Supreme Court.

basic rates lose their significance in determining the actual rate of compensation." 325 U. S. at 432.

The lack of significance of the stated hourly rates is perhaps even more marked in the instant case than in *Harnischfeger*. In that case the employees working on a project were sometimes assigned different hourly rates of pay. In the instant case, however, virtually all employees receive the same rate, namely 90 cents per hour. Since the only effect of the hourly rate, with negligible exceptions, is to determine the employee's share in the group piece rate earnings, the compensation actually received by employees would be the same whether the hourly rate was fixed at 40 cents or $1.10 instead of 90 cents. This is illustrated in the footnote.[8] Thus, as long as

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[8] Assume that in 100 man-hours the plant produces $641.67 worth of wheels, so that the employees' share (24 percent) is $154.

(1) Employees A & B work 50 hours. Each is advanced $0.90 for 40 hours+$1.35 for 10 hours, or $49.50. Balance to be distributed, $154—$99=$55. Each receives ½ of $55 or $27.50. $27.50+$49.50=$77, total wage to each.

If the rate were 40 cents, each would be advanced 40 hours @ $0.40+10 hours @ $0.60 or $22.00. Balance to be distributed $154—$44 =$110. Each would receive ½ of $110 or $55. $55+$22=$77, total wage to each.

If the rate were $1.10, each would be advanced 40 hours @ $1.10+ 10 hours @ $1.65 or $60.50. Balance to be distributed, $154—$121= $33. Each could receive ½ of $33 or $16.50. $16.50+$60.50=$77, total wage to each.

(2) Employee A works 40 hours, B works 60 hours. A is advanced $0.90 for 40 hours or $36.00, B is advanced $0.90 for 40 hours+$1.35 for 20 hours or $63.00. Balance to be distributed, $154—$99=$55. A receives 36/99 of $55.00 or $20; B receives 63/99 of $55 or $35. A's total wage is $36+$20=56; B's total wage is $63+$35=$98.

If the rate were 40 cents, A would be advanced 40 hours @ $.0.40=$16. B would be advanced 40 hours @ $0.40+20 hours @ $0.60=$28. Balance to be distributed, $154—$44=$110. A would receive 16/44 of $110 or $40; B would receive 28/44 of $110 or $70. A's total wage would be $16+$40=$56; B's total wage $28+$70=$98.

If the rate were $1.10, A would be advanced $44 for 40 hours, B would be advanced 40 hours @ $1.10+20 hours @ $1.65=$77. Balance to be distributed $154—$121=$33. A would receive 44/121 of $33 or $12. B would receive 77/121 of $33 or $21. A's total wage would be $44+ $12=$56; B's total wage $77+$21=$98.

compensation at the hourly rate does not exceed the piece rate, any figure could be fixed as the hourly rate without changing the employee's pay. In these circumstances it can hardly be doubted that the piece rates and not the stated hourly rate determine the pay which the employees receive. The conclusion seems inevitable, therefore, as the Supreme Court held in *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 425, that since the piece rate "accurately mirrors all payments that they [the employees] normally will receive from the respondent [the employer] during the workweek," it furnishes the basis of "the average regular rate at which the [employees] are employed" and "such a rate is the one that must enter into any calculations of overtime payments due under § 7 (a)." "The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of § 7 (a)." *Walling v. Harnischfeger Corp., supra,* at 431-432.

2. *The allocation retroactively of piece rate compensation to straight time and overtime does not constitute compliance with the Act.* If the employees "received only piece work wages it is indisputable that the regular rate would be the equivalent of the translation of those wages into an hourly rate. *United States v. Rosenwasser,* 323 U. S. 360." *Walling v. Harnischfeger Corp.,* 325 U. S. 427, 431. The regular rate is also the average of piece rate payments when the latter are superimposed upon agreed hourly rates as a guarantee or a bonus. *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419; *Walling v. Harnischfeger Corp., supra.* Consequently, under these decisions, the failure to pay overtime compensation based upon the average piece rate earnings was held to constitute a violation of Section 7. The principle of these decisions applies in the instant case to render respondent's compensation plan invalid because of its

failure to provide for overtime compensation in addition to the piece rate earnings. The only feature of the instant plan which presents a problem different from those disposed of by the Supreme Court in the *Harnischfeger* and *Youngerman-Reynolds* cases *supra*, is the provision that the piece rate compensation shall be apportioned to straight-time and overtime hours so that the amount allocated to overtime equals pay at time and one-half the rate of the amount allocated to straight time.

Under the decisions of this Court and numerous circuit courts of appeals such an attempted allocation to straight time and overtime of a constant rate of pay, which is in fact the same rate for overtime hours as for straight-time hours, defeats the statutory overtime purposes and does not constitute compliance with the overtime requirements of the Act. *Walling v. Helmerich & Payne*, 323 U. S. 37; *149 Madison Ave. Corp. v. Asselta*, 331 U. S. 199; *Castle v. Walling*, 153 F. (2d) 923 (C. C. A. 5); *Watkins v. Hudson Coal Co.*, 151 F. (2d) 311 (C. C. A. 3); certiorari denied 327 U. S. 777; *Seneca Coal & Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10), certiorari denied 320 U. S. 772; *Patsy Oil & Gas Co. v. Roberts*, 132 F. (2d) 826 (C. C. A. 10); *Walling v. Helmerich & Payne*, 138 F. (2d) 705 (C. C. A. 10); cf. *Asselta v. 149 Madison Ave. Corp.*, 156 F. (2d) 139 (C. C. A. 2); *Walling v. Green Head Bit & Supply Co.*, 138 F. (2d) 453 (C. C. A. 10); *Walling v. Alaska-Pacific Consolidated Mining Co.*, 152 F. (2d) 812 (C. C. A. 9), certiorari denied 327 U. S. 803. The application of these holdings to the instant case renders the allocation formula invalid and compels the conclusion that the plan fails to satisfy the statutory requirements.

As pointed out above a basic purpose of the overtime requirement of the Act was "to spread employment by placing financial pressure on the employer" *(Walling v.*

Helmerich & Payne, 323 U. S. 37, 40) "by increasing the employer's labor costs by 50 per cent at the end of the 40-hour week." *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, 423. See also *Walling v. Harnischfeger Corp.,* 325 U. S. 427, 431; *Overnight Motor Co. v. Missel,* 316 U. S. 572, 578; *Walling v. Wall Wire Products Co.,* 161 F. (2d) 470 (C. C. A. 6); *Bumpus v. Continental Baking Co.,* 124 F. (2d) 549, 551, 552 (C. C. A. 6), certiorari denied 316 U. S. 704. If compensation is fixed by a rate of pay which is the same for straight-time and overtime hours, any subsequent allocation of that compensation into so-called "straight-time" and "overtime" segments allows the employer to escape completely the burden of a 50 percent premium" for overtime hours. *Youngerman-Reynolds* case, 325 U. S. at 426.

It is for this reason that the courts have consistently frowned upon attempts to treat constant rates of pay as embracing both straight time and overtime. The regular rate for the purpose of computing overtime under the Act is "the hourly rate actually paid for the normal non-overtime workweek" regardless of contractual attempts to designate a different rate. *Walling v. Helmerich & Payne,* 323 U. S. 37; *United States v. Rosenwasser,* 323 U. S. 360; *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, 424; *Walling v. Harnischfeger Corp.,* 325 U. S. 427; *149 Madison Ave. Corp. v. Asselta,* 331 U. S. 199. Thus attempts to designate as the "regular rate" a rate lower than that "actually paid," so that the total compensation will appear to include overtime compensation have been consistently condemned by the courts. This has been true where the attempted designation of the lower rate has been by an allocation device as well as by other means. In *Walling v. Helmerich & Payne, supra,* the Supreme Court held that an employer

who paid his employees a daily wage could not agree with his employees that the daily wage was allocated into straight-time and overtime segments because the "straight-time rate" assigned to certain hours of the day was not the rate actually paid but was "unrealistic and artificial." 323 U. S. at 42. Similarly, in *149 Madison Ave. Corp., v. Asselta, supra,* an attempt to allocate a weekly salary for a fixed number of hours into straight-time and overtime segments was held invalid. Although Mr. Justice Frankfurter in his concurring opinion in the *Youngerman-Reynolds* and *Harnischfeger* cases (325 U. S. at 426, 433-434) suggested that the plans in those cases might have been valid had the parties agreed that the excess of piece rate over hourly rate was to be allocated between straight time and overtime, the majority of the Court stated that "where the facts do not permit it, we cannot arbitrarily divide bonuses or piece work wages into regular and overtime segments, thereby creating an artificial compliance with Section 7 (a)." *Harnischfeger* case, 325 U. S. at 432.

In the same manner the circuit courts of appeals have consistently rejected attempts to translate rates of pay which were the same for non-overtime and overtime hours into other rates to avoid the payment of additional compensation for the overtime hours. *Castle v. Walling,* 153 F. (2d) 923 (C. C. A. 5); *Walling v. Alaska-Pacific Consolidated Mining Co.,* 152 F. (2d) 812 (C. C. A. 9) (daily wage); *Watkins v. Hudson Coal Co.,* 151 F. (2d) 311 (C. C. A. 3), certiorari denied 327 U. S. 777; *Seneca Coal & Coke Co. v. Lofton,* 136 F. (2d) 359 (C. C. A. 10), certiorari denied 320 U. S. 772; *Patsy Oil Co. v. Roberts,* 132 F. (2d) 826 (C. C. A. 10); *Walling v. Helmerich & Payne,* 138 F. (2d) 705 (C. C. A. 10) (weekly salary); *Walling v. Green Head Bit & Supply Co.,* 138 F. (2d) 453 (C. C. A. 10) (hourly rate).

All these decisions recognize that to permit a regular rate of pay to be redistributed after the event into straight-time and overtime is to permit a complete disregard of the statutory objective to increase the cost of hours after 40 by 50 percent. Under the plan in the instant case the cost of the employer was precisely the same whether the work was performed before or after 40 hours. This may be illustrated by the following example: Assume that it takes 600 man hours to produce 1,000 silicate carbon vitrified wheels. Under the unit production costs previously referred to of $0.936 per wheel, the employer will pay $936 as wages for 1,000 such wheels. If 15 men work 40 hours a week the employer will pay them $62.40.[9] If 10 men each work 60 hours a week, the employer will pay them each $93.60. By paying the same total of wages in each case, the employer in the second instance has defeated the purpose of the Act by employing fewer employees for longer hours, but he has incurred no overtime penalty even though his payroll records will show an overtime payment to the second group of employees.[10]

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[9] Appellee's plan is on a monthly not a weekly basis. To simplify our illustration, we show weekly rather than monthly figures. The mathematical principle, of course, is the same.

[10] The first group of employees would be paid as follows: 40 hours @ $0.90, the "hourly rate," or $36.00 advanced to each of the 15 employees, a total advance of $540. Balance to be distributed $936—$540=$396. This balance is divided among the 15 employees in proportion to their advanced earnings, $36.00/$540.00 or 1/15. Each employee gets 1/15 of $396 or $26.40. Total wage to each $36.00+$26.40=$62.40.

The second group would be paid as follows: 60 hours 40@ $0.90 and 20 "overtime" hours @ $1.35 or $63.00 advanced to each of 10 employees, a total advance of $630. Balance to be distributed, $936—$630=$306. This balance is divided among the 10 employees in proportion to their advanced earnings, $63.00/$630.00 or 1/10. Each employee gets 1/10 of $306 or $30.60. Total wage to each, $63.00+$30.60=$93.60.

Although the second example ostensibly includes overtime pay, the employer in each case is paying a total of $936 for 1,000 wheels.

That no overtime premium is being paid is also readily demonstrated by viewing the plant production as a whole. If we assume that the plant could produce 10,000 wheels a week if every employee worked 40 hours, each of those wheels cost the employer in wages $0.936, or a total wage bill in such a week of $9,360. If the employer wishes to increase his output he could work the employees over 40 hours, and continue to pay $0.936 per wheel, just as if no overtime were being worked. Thus the employees could work 48 hours (an increase of 8 hours or 20 percent) and the plant's output would go up to 12,000 wheels (an increase of 20 percent) and the labor cost would likewise go up 20 percent. But the purpose of the Act was to penalize the working of hours in excess of 40, so that the employer in a 48-hour week should pay time and one-half for the last 8 hours, or 52 hours' pay for 48 hours' work.

Although the plan creates the bookkeeping appearance of overtime payments, this is accomplished not by increasing the employer's labor costs for overtime, but by decreasing the employees' straight-time pay for non-overtime hours.

Respondent indeed concedes this effect of its plan, urging such allocation of total wages as proof of compliance. Thus in respondent's Exhibit 65 (R. 191) under column 15, respondent showed total wages for straight time hours worked for three months selected by respondent to be 21.31%, 21.37% and 20.7% respectively, of the production value of goods produced during such straight time hours. But it is undisputed that if no overtime had been worked during such months the total wages paid for the same straight-time hours would have been a greater amount, i.e. 24% of the production value of goods produced during such straight-time hours. This bookkeeping reduction of straight-time wages is necessitated solely by the fact

that overtime hours were actually paid for at the same rate as straight-time hours, i.e. 24% of the production value of goods produced. We submit that the arbitrary allocation of the total wage payment so computed without regard to whether or not overtime hours are worked into straight-time and overtime does not constitute compliance with the Act.

3. *Respondent's plan is not in the nature of a profit sharing plan.* The Circuit Court of Appeals, apparently sustained the validity of the plan herein, because it conceived its incentive features to be in the nature of a profit sharing plan, stating:

> "Rather its nature was that of a profit sharing plan. The profits to be so shared were the combined results of the efficient efforts of all employees, all departments, and the management. No individual employee received his additional compensation on the basis of what he individually did, or on the basis of his individual piece rate production" (R. ...).

Whether the measure of wages paid is the effort of the individual employee, or the group effort of all of the employees, or some standard having no connection with effort, is of no relevance to the case. We may assume that the purpose of the plan was to promote increased effort on the part of the production employees. Indeed, the Circuit Court of Appeals so concludes, referring in its opinion to the hourly rate plan in existence "before the production savings plan was proposed for the purpose of promoting incentive and increased efficiency among production employees."

But irrespective of the working of the plan in this respect, the plan provides a measure of the total compensation to be paid based on a fixed price for each unit pro-

duced. Such being the measure of compensation, we submit that the Act requires that units produced in overtime hours be paid for at one and one-half times the rate for units produced in straight-time hours.

On its face the plan is not in the nature of a profit-sharing plan, having no relation to "profits" and being based solely on production.

Nor does the plan herein provide for a "bonus" as that term is used in the Administrator's "bonus" releases (R. 26-34) and which are applicable to profit-sharing plans. In the situations described by the Administrator, a bonus or additional amount, determined *without regard to hourly rate payments,* is paid *in addition* to such hourly rates. In all of such cases the hourly rate remains significant in the determination of total wages. Under all "bonus" plans described by the Administrator the total labor cost of the employer and the wages received by the employee is actually greater for production in overtime hours.

But in the case at bar, the bonus, or bonus savings, is only the *subtraction* of the hourly rates previously advanced from the total amount agreed to be paid which is based on a fixed price per unit produced, and which is the same whether produced in straight-time or overtime hours.

In the case at bar the amount advanced on the hourly rates including overtime plus the so-called bonus always equals the same fixed price per unit produced, which is the same regardless of whether or not overtime hours are worked.

For the foregoing reasons, we submit that the Circuit Court of Appeals has herein decided an important question of federal law which has not been but should be settled by this Court. We further submit that the decision herein by the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

The precise plan involved herein has never, so far as we have been able to ascertain, been involved in any other case and is not in widespread use by employers.

However, if the decision of the Circuit Court of Appeals herein is approved, and held to be within the requirement of the Act it will undoubtedly be widely adopted, affording as it does a method whereby actual wages paid per unit produced remain constant without regard to whether or not overtime hours are worked.

CONCLUSION

Wherefore, we respectfully submit that this petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

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